Essential Contract Elements

Objective

1. Provide examples; distinguish between private standards for purchasing goods and traditional rules of Government contract formation and administration.

Definition of a Contract

A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

The legal definition of a contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. A contract, in essence, spells out the duties and responsibilities of each party in the contract. If one of the parties fails to uphold their responsibility or fails to perform their duty, the law will step in and provide to the party that is harmed a remedy for the failure of the other party. The definition of a contract recognizes the duty of both parties and thus, the court Will fashion an appropriate remedy for the failure. If the law will not provide relief to the harmed party or does not recognize any duty to perform, then the business dealing entered into by the parties cannot be classified as a contract. Contracts may consist of a single promise by one person to another or it may involve any number of persons or any number of promises.

Technically, there is a difference between a contract and an agreement. "Agreement" is a broader term since it encompasses both those promises that the law will enforce and those that the law will not enforce. This difference illustrates the point that a contract is strictly a legal concept and that the kinds of promises that are enforceable through the legal system are those that the system deems of sufficient social or economic importance to warrant enforcement.

Contract Elements

All contracts will have the following six elements:

1. Capacity
2. Mutual Assent
3. Consideration
4. Lawful Purpose
5. Certainty of Terms
6. Form Provided by Law

In order for our legal system to enforce agreements as contracts, certain essential elements must be present. There must be at least two persons, each of whom has legal capacity to act. The parties to the contract must, by offer and acceptance, manifest assent to the terms of the contract. The phrase "manifest assent" is used rather than the word "agree" because contract formation is essentially an objective process; the parties are judged not by what their subjective intention might be, but by what they lead others to reasonably believe. Use of this objective standard to measure assent prevents one party from claiming, after it becomes apparent to him that the bargain or agreement is not whathe really wanted, that he really meant something else that the other party did not know about. Through the use of an objective standard, the parties are held to have intended that which a reasonable person would interpret their statements or actions to mean. For example, a contractor signs a Government contract, but later claims he did not understand or accept all the FAR clauses. To determine whether the parties had manifested their intent to be bound by the contract, it does not matter that the contractor did not in fact understand the terms. Under the objective standard, a reasonable person would not sign a contract that he did not understand. Therefore, the contractor is probably bound by the FAR provisions.

The parties must each give something of value, called "consideration." The terms of the agreement must be clear and certain. The agreement must not require the performance of an act that has been declared illegal, either by statute or by special rules of the common law. Finally, to be enforceable, the agreement must be in the form required by law, i.e., it must be written when required by the Statute of Frauds. This chapter will explore these six elements: 1) capacity, 2) mutual assent, 3) consideration, 4) lawful purpose, 5) certainty of terms and 6) form provided by law.

Historically, the law that applies to private or commercial contracts has been determined by each state for contracts formed or performed within its boundaries. Consequently the law varied slightly from one state to the next. In order to establish greater consistency in contract law and related matters as the nation grew and interstate transactions increased, a "Uniform Commercial Code" (UCC) was developed beginning in 1945; after various debates and modifications, it was adopted by 49 states (all but Louisiana) by 1962. The UCC is state law, not Federal law, and there are State by State differences.

Capacity

The law seeks to protect the party that has a defect in capacity. Capacity defects produce voidable contracts.

Legal incapacity or legal incompetence is the method the law uses to protect a party who may not have the ability to understand the terms of an agreement. For the most part, a contract entered by a person lacking legal capacity is *voidable.* It is enforceable only at the option of the party the law seeks to protect. In contrast, a void contract is not enforceable at all, because in the eyes of the law it never existed. The intention of the legal system is to protect certain classes of persons against their own unwise acts, while at the same time to allow members of that class to enforce contracts that will benefit them. Under this theory the contract is enforceable against the party who is not to be protected by the incapacity rule. Legal incapacity may arise from infancy, insanity, drunkenness, and contractual incapacity on the part of corporations.

In general, the contracts of infants (historically defined to be persons less than eighteen years of age) are voidable at their option. In most cases the infant need not do any affirmative act in order to derive the benefit of the rule of voidability. An infant may avoid his obligations under an executory (Le., unperformed) contract by merely doing nothing. In order to bind himself in a contract entered during infancy, the infant must ratify the contract upon reaching majority. Ratification is any act that indicates that the infant intends to be bound by his promise. Such ratification can be expressed, orally or in writing, or implied. Ratification by implication occurs where the infant after reaching majority performs the contract (or begins performance), e.g., an infant obligated to repay a loan makes an installment payment after reaching majority.

Where the contract has been performed or partially performed by the infant, he must take some affirmative action in order to avoid obligation under the contract. The affirmative action is referred to as disaffirmance. The result will be to have the contract rescinded, and as in any case of rescission, each party must return any consideration received from the other party. Therefore, when an infant disaffirms a contract he must return whatever consideration he has received or he will not be able to demand the consideration that he transferred to the adult party. An interesting question arises when the infant cannot return what he has received in consideration because he has squandered it. The majority of states would hold that the infant is still entitled to the return of the consideration with which he parted.

There is one major exception in which the infant is liable for consideration given to him under the terms of a contract. The general rule is that an infant is liable for the reasonable value of "necessaries" that are furnished him. This liability arises not out of any contract that he may have entered (this contract is still voidable at his option), but out of the theory of "quasi-contract," which is discussed later. In other words, an infant is not liable for necessaries, which he has contracted for but not utilized, but only for those necessaries that he has actually consumed. The value that the infant is liable for is not the retail price or the cost to the one who furnished the necessaries but rather the value that these things were to the infant. In most cases, of course, the value will be approximately the same as the retail price, assuming that the infant would have had to pay a retail price for these necessaries. Generally speaking, a necessary includes subsistence, health, comfort and education. However, the age of the infant, his customary standard of living and other factors will bear heavily on the definition in any particular case.

The law concerning insane persons relative to voidability is much the same as it is for infants. One important difference involves the distinction between nondeclared and adjudicated insanity. Where a party to a contract has, prior to the contract formation, been legally adjudged insane, his contracts are absolutely void. Where a party to a contract has not been legally declared insane before entering the contract, the contract is voidable only if the insanity existed at the time that the contract was formed. If the party was lucid at the precise moment of contract formation, the contract is not voidable.

A contract made by a person while he is drunk, so that he is incapable of understanding the effect and nature of it, is voidable at his option. The rules applicable infancy with respect to affirmance, ratification and disaffirmance are generally applicable to contracts of drunken persons, once he/she becomes sober.

The corporation or joint venture as party to a contract presents, on occasion, a special case. Generally, a corporation has implicit power to enter a contract, insofar as the contract relates to the accomplishment of the corporation's stated purpose. However, where a corporation enters a contract that does not advance the stated purpose, or is not within the corporation's powers as granted by the charter of incorporation it receives from the state, the contract is said to be *ultra vires.* While there is some difference of opinion as to the effect of an ultra vires contract, all states agree that where the contract has been fully performed on both sides, neither party to the contract may disaffirm it. Where the contract is wholly executory (i.e., unperformed), all states agree that neither party may enforce it. However, where there has been part performance on each side, or where one side has performed, the majority of courts treat the contract as if the corporation did in fact have the authority to enter the contract. A small minority of states would allow a recovery only on the basis of quasi-contract.

Mutual Assent

Mutual Assent' consists of three areas:

1. Offer,
2. Acceptance, and
3. Meeting of the minds.

Offer - An offer is defined as a manifestation of assent to enter into a bargain. Reduced to its simplest components, a contract is formed by acceptance of an offer. An offer is a proposal by a person, referred to as the offeror that a contract is entered into. The person to whom the offer is extended is called the offeree. When the offeree intends to accept the offer and communicates this acceptance to the offeror, a contract is formed. Despite this simple explanation, however, contract formation is not as simple or as easy as it may appear to be. First, there is often a question as to what is an offer, and exactly what is required for an acceptance to be effective. One of the most frequent problems arising in this area concerns the distinction between an offer and an advertisement. Advertisements are generally construed as invitations for offers, primarily because the language of the advertisement does not indicate a present contractual intention on the part of the one advertising. Thus, where published notices state that competitive bids will be received for a particular construction project or for the supply of materials, the submission of a bid in response to the request merely constitutes an offer and not an acceptance of an offer.

It is a cardinal rule that only the intended offeree can accept an offer. In many cases this means that there is one and only one specific offeree in whom the power of acceptance is vested. Acceptance of an offer by one other than the intended offeree does not result in contract formation. Obviously the offeror may direct the offer to more than one person; he may direct it to a class of persons or to the public generally, intending that any member of the class or public have the power to accept. For example, reward notices for the apprehension of known criminals are posted or circulated and the intention of the offeror (the one promising to pay the reward) is that all members of the public are offerees and can accept by meeting the terms of the offer. Of course, under most circumstances there can be only one acceptance, but the number of potential offerees is unlimited.

Only the intended offeree has the ability to accept the offer. In most situations, however, the power of acceptance is limited to a specific offeree, and no other may accept the offer. The notice of the offer must be communicated to the offeree before the offer can be accepted. An uncommunicated offer is not an offer at all. Furthermore, an offer communicated to a particular offeree cannot be accepted by another person who was not intended to be an offeree. Therefore, learning about an offer will not necessarily give one the opportunity to accept. It is not necessary that the offeror personally communicate the offer to the one intended to be the offeree. An agent who has the authority of the offeror to contact the intended offeree can make this communication.

The foregoing might indicate that there are a number of contingencies that often make contract formation difficult, but in the vast majority of cases, contract formation is easily accomplished. The most important ingredient necessary for contract formation is that both parties involved in the offer and acceptance intended that a contract be formed.

An offer can be revoked at any time prior to acceptance.

A general rule is that an offer continues to exist until the time stated in the offer itself for its expiration, or if no such time is stated, until the expiration of a reasonable time, so long as the offeree does not revoke the offer. When the stated time (or a reasonable time, if no time is stated) has elapsed, the offeree's power of acceptance terminates, unless the offer is reinstated, there can be no contract formation involving the original offer. The clearest case is where the offer itself contains a time limit. The offeree must accept within the specified time, and it is no excuse that circumstances beyond the control of the offeree caused the delay. Frequently, the time stated in the offer is not fixed as to a specific calendar day, but rather is based on the happening or the non-happening of a condition. Thus a statement in the offer that the offer will remain open as long as the offeree remains in possession and control of a specific item would extend the duration of the offer until the offeree no longer has such possession or control. If the offeror does not express a definite time period for the duration of the offer, the offer remains open for a reasonable time. What is reasonable usually depends upon the nature of the contract proposed, the usage of business, and other circumstances in or surrounding the particular situation. Certain offers by the very nature of the subject matter involved are implicitly intended to expire within a relatively short time period. Thus where the offer is for the sale of corporate stock, futures, or other subject matter that have quickly fluctuating prices, a reasonable time may be defined in hours or days. On the other hand, certain types of subject matter may have rather constant price structures over an extended period of time. In these cases a reasonable time may be defined in terms of weeks or months. In any case, a reasonable time is a question of fact to be decided on a case-by-case basis and according to what the offeror must have reasonably intended under all the surrounding circumstances.

Making an Offer Irrevocable –

Under common law, a promise not to revoke an offer must be supported by adequate consideration to be enforceable. Under the UCC, section 2-205 applies. In essence, section 2-205 states the a promise not to revoke is enforceable if the offer:

- Is made by a merchant;
- Is in writing; If so, then
- No consideration is necessary; and
- The offer will remain open for the time stated in the offer, or a reasonable time.

A promise not to revoke is, in a sense, a separate contract to preserve a continuing right to accept an offer. In the typical case, an offeror makes an offer and promises that it will remain open for a stipulated period of time. To insure that the offeror will keep the offer open, the offeree gives to the offeror some consideration with the intention that this exchange will bind the offeror to keep his the promise. This contract involves (1) one party's promise to keep an offer open and (2) the other party's payment or promise of payment of consideration; thus the offeror is being paid to keep the offer open for the stated amount of time. Consideration is necessary to prevent the offeror from revoking his offer, because, in the absence of such a payment, the offeror may with impunity revoke the offer at any time prior to its acceptance. The rationale for allowing an offeror to revoke his offer in the absence of consideration is that, at least in the United States and Great Britain, a person is generally not held to his bare, unsupported promise. There are two notable exceptions to the requirement that there be consideration to support the promise not to revoke. One is the "firm offer" rule set forth at §2-205 of the UCC: if a written offer by a "merchant" (defined at §2-1'04) assures the offeree that it will be held open, it is not revocable within the stated time (or a reasonable time, if no time is specified) even though the merchant receives no consideration; the maximum time is 3 months.

The second exception is when the offeror requests as consideration a return act rather than a return promise (called an offer for a "unilateral contract") and the offeree actually begins performance of the requested act, it would be unfair to allow the offeror to revoke his offer; commencement of performance of the requested act therefore prevents revocation of the offer unless a reasonable time passes without performance being completed. For example, if a party states: "I will pay $100.00 to someone to paint this room" and someone begins painting it, the offeror cannot now withdraw his offer since performance has begun.

Revocation and Rejection of an Offer - Revocation of an offer is generally not effective until it has been communicated to the offeree. However, if the notice of revocation is not received by the offeree because of the fault of the offeree or his agent, then the revocation is effective even though the offeree does not have actual knowledge of it. In many situations, revocation may be implied by the circumstances. As an example, where an offer is for the sale of a specific thing and the offeree receives reliable information that the thing has been lost or destroyed or sold to another before he accepts the offer, the offer is implicitly revoked. The theory is that the offeree could not rationally believe that the offeror still wants to sell a thing that either no longer exists or that he no longer has available for sale. As one might imagine, cases arise in which there is a question as to the definition d "reliable information," particularly where the information proves to be false. (The fact that the information was false does not necessarily mean that the information was "unreliable"). The most frequent act by an offeree that terminates an offer is rejection of the offer. A rejection may be manifested in several ways. The method that is the most unequivocal is the express rejection. When an intended offeree communicates to the offeror that he does not want to accept the proposal, the offer is terminated. As in the case of the revocation of an offer, a rejection must be communicated to the offeror in order to become effective. The problems discussed above concerning the communication of revocations are also true with respect to rejection.

Counter-Offers - A counter-offer revokes all prior offers. Therefore, once a counter-offer has been made, the original offer is no longer available to be accepted. Notice also that the role of the parties switch once a counter-offer has been made. The original offeror becomes the offeree and the original offeree, by making the counter-offer, now becomes the offeror.

Another method by which the offeree rejects the offer is by making a counter-offer. One form of counter-offer is to accept an offer, but with a material term changed or altered. The offeree may state "I accept your offer except that I am willing to pay the price stipulated; instead I accept at ... price." Alternatively, the offeree may make a counterproposal: "I am willing to contract with you but instead of your terms I propose the following terms…” In either of these examples the communication by the offeree constitutes a counter-offer. The effect of a counter-offer is two-fold. First, the original offer is effectively terminated as if by an express rejection. Secondly, the counter-offer itself becomes an offer and the result is that there is an offer outstanding between the original parties, except that their positions are reversed; that is, the original offeror now becomes the offeree of the counter-offer, and the original offeree becomes the offeror of the counter-offer. Occasionally, however, a counter-offer will not constitute a rejection of the original offer. This happens where either the offeree makes it clear in the counter-offer that he is not rejecting the original offer but merely bargaining for different terms, or where the original offer itself leaves some room for negotiation. The instances in which counter-offers do not reject the original offer are very few indeed.

Terminations of Offers - There are ways, other than by lapse of time, in which an offer may be terminated. Termination of an offer can be brought about by an act of the offeror, by an act of the offeree, or by acts or circumstances beyond the control of either the offeree or the offeror. The act of the offeror that terminates an offer is called revocation. It is important to keep in mind that an offer for a proposed contract is under the absolute control of the offeror, at least initially. In general an offeror may designate the time that the offer is to remain open, the place where the acceptance is to be communicated; the manner in which the offer may be accepted; and any conditions that he wants to impose. In addition, an offeror can recall his offer at any time before the acceptance has become effective. This power of recall is virtually absolute, although there are limited exceptions such as where an option has been paid for by the offeree.

Circumstances beyond the control of either the offeror or the offeree may occur which have the effect of terminating the offer. Death of either the offeror or the offeree prevents contract formation. The principle involved is that one cannot contract with a dead person. Thus where the offeror dies there cannot be any presumption of a continuing intention to be bound into contract. Similarly, where the offeree dies there cannot be a valid acceptance because offers are personal to specific offerees and cannot ordinarily be accepted by others. An exception is recognized in those situations where the offer is an irrevocable one (e.g., an option). The legal theory is that the offeror by binding himself by contract to keep an offer open for a stated time has knowingly and willingly relinquished his right to revoke, and that his own continued existence is therefore not vital to contract formation. But this is true only in those cases where the proposed contract does not require the personal services of the offeror or the offeree. Where the offeree dies before accepting, there cannot in any case be a valid acceptance.

Where a positive law is enacted which declares the subject matter of the contract to be illegal, it is said that the offer is terminated as a matter of public policy. This termination will occur whether the performance of the offeror or the offeree is declared to be illegal or against some positive rule involving public policy.

Acceptance - Acceptance must be unconditional and unequivocal. If the purported acceptance is conditional it is viewed as a counteroffer. If the purported acceptance is equivocal, it is not a valid acceptance.

Most offers can be accepted only by or on behalf of the designated offeree. As explained before, the offeror generally has the absolute right to choose the person with whom he wants to enter a contract. Subject to the ordinary rules concerning the legal relationship of principal-agent, someone other than the offeree can accept the offer for the benefit of the offeree, provided that the offeror has not stipulated to the contrary. The acceptance by the offeree must be unequivocal. The reason is that the offeror must know hat the state of his offer is, and he must not be put in a position of uncertainty by a communication from the offeree that is ambiguous. Therefore, a conditional acceptance (where the offeree accepts subject to the offeror doing something more than he promised in the offer) or a communication that hedges, procrastinates, or leaves the offeror in doubt, does not constitute a binding acceptance.

Unless otherwise indicated by the offeror or by the circumstances, an acceptance must be communicated in order to become effective and bind the parties in contract. One situation in which notice of acceptance is not necessary for contract formation is where the offeror looks forward to a unilateral contract and under the circumstances the offeror will know that the offer has been accepted by inspection of the place where the act is to be performed. Where the offeror asks for his grass to be cut by the offeree, the offeree does not have to notify the offeror that he has accepted. Acceptance is accomplished by completing the act requested, It is only in those unilateral contract cases where the offeror would not in the ordinary course of events know that the act had in fact been performed, that the offeree is under a duty to communicate the acceptance of the offer to the offeror. In contrast, in all bilateral contract situations it is absolutely necessary for. the offeree to communicate his acceptance (the return promise) to the offeror unless by an express provision of the contract or by implication from past dealings the offeror waives communication of the acceptance.

Time, manner, form, and other conditions relating to communication of the acceptance are within the absolute control of the offeror. If the time, place and means of communication are specified by the offeror, no other time, place or means will constitute an acceptance. Occasionally, it is important to distinguish between the requirement that the acceptance must meet certain stated conditions, and a mere suggestion in the offer that certain conditions would be desirable. In the latter case the acceptance could be effective even though the offeree ignored the suggestions of the offeror.

The problem that arises most frequently concerning the acceptance is that of when the acceptance becomes effective. Published cases are replete with communication time dilemmas. Was a contract formed when the acceptance was mailed before the offeree received a revocation? Was a contract formed when the offeree mailed his letter, even though the letter was lost in the mail? Was a contract formed when the offeree mailed an acceptance butt then changed his mind and telegraphed a rejection that reached the offeror before the mailed acceptance? Before answers can be given to these questions, it is necessary to establish when an acceptance becomes effective.

Although both a revocation and a rejection are effective only when received, this is not true of acceptance. It is a general rule that an acceptance is effective as soon as the offeree dispatches it if the means used to communicate the acceptance is one authorized by the offeror. Since the offeror has the absolute power and right to determine how the acceptance must be communicated, he is deemed to guarantee that the communication will be handled properly; in effect, the agency used for communication becomes the legal agent of the offeror. Under the familiar theory that notice to the agent serves as notice to the principal, communication of the acceptance becomes effective and binding when the offeree gives the acceptance to the agency for communication. But there is a distinction between so-called "authorized" and "unauthorized" means of communication. If the offeree uses an authorized means of communication, then the acceptance is effective as soon as dispatched by the offeree. This is sometimes referred to as the "mailbox rule": since mailing the acceptance is usually an authorized means of communicating it, an acceptance is usually effective when it is placed in the mailbox. If an unauthorized means of communication is used, then the acceptance is effective, if at all, only when received by the offeror. It is quite possible for the offeror to designate a means of communication that must be used, so that any other will be ineffective even if the acceptance is actually received. In most cases, however, the offer is not so restrictive and any means of communication used by the offeree will be effective; yet the time of its effect will depend on whether or not the means was authorized.

A very general rule is that the offeree is authorized to use the same means of communication as the offeror used. Technically, any means of communication other than one used by the offeror or designated by him is an unauthorized means of communication.

An attempted acceptance after the time for acceptance as stipulated in the offer (or after the lapse of a reasonable time) is merely a counter-offer that in turn may be accepted or terminated in the usual manner.

Acceptance of an offer comes about by the offeree expressing in so many words that he accepts the proposal put forth by the offeror. But this is not an exclusive method of accepting an offer. On some occasions the offeree's conduct will result in an acceptance being implied. As an example, receipt and retention of goods or property by the offeree may result in the implication that the offeree accepts the goods or property and the contract of which their shipment was a part. Similarly, performing an act that is inconsistent with a theory that the offeree does not intend to be bound by a contract (such as exercising physical control over property or selling it to another) may imply acceptance of an offer concerning the property.

In addition to affirmative conduct on the part of the offeree, inaction may constitute an acceptance. From past dealings, custom of the trade or other standards that bind the parties to particular conduct, silence on the part of the offeree may result in acceptance. The general rule, that silence alone is not acceptance, is universally followed. But silence coupled with something else, such as past dealings, or the circumstances surrounding the particular offer, may constitute acceptance. The formation of contracts through silent acceptance is rare.

Meeting of the Minds - In addition to offer and acceptance, the parties must be thinking of the same bargain.

Contract formation involves a manifestation of mutual assent by at least two persons. It is sometimes said that in order for there to be a contract there must be a "meeting of the minds" of the parties. The minds need not "meet" in a subjective sense; it is sufficient that the parties manifest mutual assent in an objective sense. Where the offeree misunderstands what the offeror meant, his subjective understanding is material only if the offeror's words could have had two or more meanings.

Question: If two parties sign a contract but each knows (or has reason to know) that the other party has a very different understanding as to what is being bought and sold, is a contract formed? See the case of A.B. DICK at Vol. 2.

Situations involving mistake are categorized as involving either a unilateral mistake or a mutual mistake. A unilateral mistake occurs where one party misunderstands either a term of the contract or some essential fact concerning the basis of the contract; a mutual mistake occurs where the parties share an erroneous belief concerning the basis for the contract. Whether the mistake was unilateral or mutual can determine whether an enforceable contract exists. If as a result of a mistake the contract as written does not reflect the terms actually agreed to by the parties, the contract can generally be "reformed" if it can be established what the actual agreement was. *Ackerlind v. U.S.,* 240 U.S. 531.

Generally, a unilateral mistake is not a basis for reformation of the contract or excusing a party's nonperformance, unless the other party knew or should have known of the first party's mistake.

As noted above, the generalization that a contract can exist only if there has been an actual "meeting of the minds" is not entirely accurate. For example, if one party misreads the contract document before signing, his misunderstanding means that there was no "meeting of the minds" but does not usually provide a basis upon which the contract will be changed or "reformed." The general rule is that a unilateral mistake is not a basis for reformation of a contract or for excusing the mistaken party's failure to perform. However, there is an important exception: where one party knows (or should realize) that the other party is entering the contract on the basis of a mistake, the courts will often allow reformation of the contract in order to avoid unfairness. .For this same reason, the contracting officer has a duty to verify an offeror's bid if there appears to be a mistake.

As explained by the Court of Claims:

What we are really concerned with is the overreaching of a *contractor by* a *contracting officer when the latter has the knowledge, actual or imputed* as *something he ought to know, that the bid is based on or embodies* a *disastrous mistake, and accepts the bid in the face* of *that knowledge. Ruggiero v. U.S.,* 420 F.2d 709,713 (Ct. CI. 1970).

The court further explained that in order to reform the contract on the grounds that the Government "should have known" of the contractor's unilateral mistake, the error must have been a "clear cut clerical or arithmetic error, or misreading of the specifications." *Id.*

Mutual Mistake – A mutual mistake gives rise to a valid basis for rescinding the contract. In fact, if the parties have a mutual mistake, no contract was ever formed.

The situation is very different where the parties to a contract discover that they have made a mutual mistake as to the basis for the contract. In order for a court to find the existence of a mutual mistake, the parties must have been mistaken as to the same essential fact. If the parties each made a mistake but the mistakes were different, the courts will treat the mistakes as concurrent unilateral mistakes rather than a mutual mistake, and not allow reformation. For example, in 1981 the General Services Administration awarded a contract to replace the roof on a federal office building. The contractor later sought reformation of the contract to increase the price, contending that a mutual mistake had been made in estimating the cost of the work. The contractor's mistake was in omitting labor costs from his calculation; GSA had not omitted the labor cost from its calculation, but had underestimated the cost of certain materials. The court held that although both parties' estimates were mistaken as to the total cost, "these separate errors do not constitute a mutual mistake that would allow contract reformation." The court explained that the contractor and the Government "did not enter into the contract based on commonly mistaken beliefs. ... "This is not a case where two parties, both thinking a cow barren when in fact she was not barren, agreed to the sale of that cow." *Bromley Contracting Co., Inc. v. U.S.,* 794 F.2d 669 (CAFC 1986).

Question: Can misrepresentation by the Government during contract negotiation give rise to a "mutual mistake"? See Appeals of JIM SENA CONSTRUCTION COMPANY, Inc. at Vol. 2.

In addition to mutual mistake, there are several other situations that can challenge the reality of consent, thereby preventing the enforcement of a contract. Under duress, the threat of physical force or harm which induces another to enter into a contract, renders the agreement void. The threat of economic or social coercion inducing another to enter a contract renders the contract voidable, at the option of the party having been coerced. Generally, threatening to do that which one has the legal right to do is not economic duress. The undue influence defense stems from some types of confidential relationship, such as parent and child, or attorney and client, where, by virtue of the relationship, one party cannot be said to have freely assented to the contract. In this situation, the contract is voidable at the option of that party. Fraud in the execution (or procurement) can involve a situation where one party does not even know he or she is entering a contract and has no intent to enter into an agreement. Any resulting agreement is void. Fraud in the inducement involves a party who understands he or she is entering into a contract, but does so based upon the other party's fraud. The elements of fraud are:

1. One party makes a false representation;
2. Of a material fact;
3. Knowing the representation to be false and intending to deceive the other party; and
4. The other party is justified in relying on that representation.

Misrepresentation contains all the elements of fraud except that there is no intent to deceive; the representation may be honest but incorrect or it may be negligent. In either event the contract is voidable.

Question: How abusive must conduct be in order to constitute "duress"? Can the Government be guilty of duress? See the case of SYSTEMS TECHNOLOGY ASSOCIA TES, INC., v. U.S. at Vol. 2.

Consideration

Consideration can take many forms. Generally, however, it must have value to the parties.

A fundamental concept involved in contract formation is bargain and exchange. Each party receives something of value and gives something of value. "Consideration" is the name given to the "something of value," i.e., the price paid for a promise. Actually, a number of things may constitute consideration: an act, a promise, forbearance, or the creation, modification or destruction of a legal relation. (Restatement of Contracts, Section 75.) In a bilateral contract each party exchanges a promise for a promise. For example, if the Government hires a contractor to build an airplane, the contractor promises to build the plane and the Government promises to pay money. Each promise is the consideration for the other. In a unilateral contract one party gives a promise as consideration, and the other party performs without making a promise. The classic example is an offer to pay $500 to whoever captures a named outlaw, "dead or alive." In that instance, the offeror is not asking anyone to promise to capture the outlaw.

The law distinguishes between sufficiency and adequacy of consideration. "Adequacy" of consideration refers to the weight or substantiality of the act or promise given in exchange (e.g., whether the amount being paid is appropriate value). Because of the difficulty in determining the actual worth of a promise or an act, the law will generally not delve into the adequacy of the consideration. In contrast, the term "sufficiency" means that consideration must have value in the eyes of the law, i.e., that it is legally "valid." "Sufficiency" is frequently defined in a negative sense: every consideration is sufficient except that which is against public policy. An obvious example of an insufficient consideration would be a promise to commit a crime.

Historically, the test of sufficiency has involved the concepts of benefit and detriment. It is said that in order for a promise to be binding, the promisor must receive in return a legally sufficient consideration and the return consideration must be legally detrimental to the one who gives it. A promise to do something that the promisor is not otherwise legally bound to do, or a promise not to do something that the promisor has a legal right to do, constitutes a "detriment." In most cases the detriment incurred as consideration is of benefit to the other party, but this is not always true. For example, if one person promises to pay another $100 if the other person promises to give up smoking cigarettes, the promise to give up smoking is a detriment to the promisor because he is giving up something that he has a legal right to do. It may not be a benefit to the one who extracted the promise, but it is not necessary that such benefit exist. It is enough that the one promising to give up smoking suffers a detriment. On the other hand, mere benefit without detriment is not sufficient consideration. So where Able agrees not to murder Baker, it can hardly be denied that Baker has received a benefit. However, such a promise is not sufficient consideration because Able does not suffer a legal detriment; he is promising not to do something that he does not have a legal right to do anyway. There are several instances where a promise to do something or not to do something is deemed not to be detrimental. Where one promises to do something and lacks legal capacity to bind himself to a contract (insanity, or perhaps infancy, in a state where these contracts are void rather than voidable), the promise is not detrimental. Where one who promises to do something is already legally bound to do that act, or where a promise is illusory in the sense that it really promises nothing meaningful (e.g., a promise to buy all of a product that the promisor may later choose to buy), there is no detriment. The same can be said of a promise to do an illegal act.

Question: If a Government contract to clean up hazardous waste calls for the contractor to obtain the necessary license within one year after contract award, and the contractor cannot perform without the license, is the contract (and the consideration to be received by the Government) illusory? *See ENVIROCARE* OF *UTAH, INC. v. U.S.* at *Vol.* 2.

Mutuality of Obligation - Another important concept is that of mutuality of obligation, meaning that both parties must be bound by the contract or neither is bound. If consideration given by one party to another is legally insufficient, the party receiving the legally insufficient consideration is not obligated. For example, Able promises to do something that he is already bound to do (finish constructing a building according to an existing agreement) and this promise 6 given in exchange for Baker's promise (to pay additional money for the completion of work). Since Able would not be suffering a detriment, then Baker is not receiving sufficient consideration in exchange for his promise. For this reason, Baker could not be held to his promise. An interesting line of cases involves the problem of "requirements contracts." Suppose, for instance, that Able promises to buy from Baker all the widgets that he needs or requires in the next year, in return for Baker's promise that he will not sell to anyone else; this is binding on both parties, because both parties have incurred a detriment: Able has given up his legal right to purchase elsewhere and Baker has given up his legal right to sell elsewhere.

The promise of future performance and the giving up of a right are valid consideration, but past acts or "favors" of contractors for which no present legal obligation exists may not be consideration for present promises by the Government. Thus, a contractor who voluntarily "gave" supplies to the Government could not claim this as consideration for missing the delivery schedule on a later acquired Government contract.

The doctrine of consideration has from time to time come under attack as being unfair and in many instances, unrealistic. The requirement of consideration in contracts stems from the theory that it is more likely that one party to an agreement will perform according to his promise if he at least has the possibility of receiving something of value in exchange and, therefore, it will not be necessary to force compliance by court action. Furthermore, where there is a question whether a promise has in fact been made, the courts are more likely to find that a promise has been made if a party can show there is consideration supporting it.

Lawful Purpose

A contract that calls for an illegal act or is against public policy is deemed to be an illegal contract. Illegal contracts are void. The courts simply will not recognize the contract's existence.

The right to contract is fundamental but not absolute. It must yield if it conflicts with the public welfare, and reasonable restrictions may be imposed under the police power when required for the public interest. For example, minimum wage laws restrict a person's freedom to contract for a lower wage. See *West Coast Hotel v. Parrish,* 300 U.S. 379 (1937). In addition to statutory limitations of the right to contract, the courts have the power to declare certain types of contracts void on the grounds that they are contrary to the public policy. "Public policy" is the common sense and conscience of the community extended and applied throughout the state to matters of public morals, health, safety, and welfare. The principle of law is based on the theory that one cannot lawfully do that, which has a tendency to be injurious to the public or against the public good.

As a general rule, a contract that violates a statute is unlawful and void and will not be enforced. A statute can expressly declare that a specific type of contract is prohibited, and such contract is absolutely void. This is true whether the statute is State or Federal.

However, there are some problems in this area. The view once taken was that a contract was void if made in violation of a statute that imposed a penalty. The modern trend seems to be to consider whether the legislature intended the statute for the protection of the public or merely provided a penalty for the purpose of raising revenue. If raising revenue was the intention, then the contract is not void and as a result is not illegal. Contracts entered into which violate public protection statutes such as those prohibiting gambling, the taking of usury, restrictions on labor, business, etc., on Sunday, laws dealing with traffic in intoxicating liquor, are void. Similarly, Federal statutes prohibit certain types of contract actions, such as contracts that determine the contractor's payment as a percentage of the cost incurred by the contractor (i.e., cost plus a percentage of cost contracts) .

Contracts that bring about results that the law seeks to prevent are said to be unenforceable as "against public policy." Generally, actual injury or damage need not be shown since it is the tendency to prejudice the public good that is being prohibited. The following list is not exhaustive but merely illustrative of those types of contracts which are deemed to be against the public interest: a. agreements to unreasonably restrain trade or business (reasonable restraints, such as a promise not to engage in business for a short time and in a small area, are not against public policy and are therefore enforceable); b. agreements for the sale of, or traffic in, a public office (as where I contract with you for a price to use my political influence to get you appointed to a public office); c. agreements by public officers to accept greater pay than is fixed by law for the performance of official duties (where I offer a public official money to do something that he already is required to do - here the danger is that he may not want to do his job in the future unless he gets extra pay); d. agreements to procure Government contracts by personal or political influence or corrupt means (here, the general rule is that if the fee is contingent upon receiving a contract, it appears that corrupt means or duress will be used and this is against the public interest); e. agreements by or between public or quasi public corporations which interfere with their public duty (e.g., where two railroads might contract to do something in unison' which might adversely affect their service to the public).

The law will not aid either party to an illegal contract. If the contract is executory (unperformed), neither party may enforce it. If the contract is executed (performed), a court will not permit rescission and recovery of what was given in performance. Where an agreement is illegal in part only, the part that is lawful may be enforced, provided that it can be separated from the part that is illegal, but not otherwise. If any part of the consideration that is given for a single promise is illegal and there is no possibility of separation, there can be no enforcement. If several considerations, one of which is bad, are given for several promises, and the legal consideration is by its terms apportioned to the legal promise, the legal part is enforceable. If two promises, one lawful and one unlawful, are given for a legal consideration, the lawful promise is enforceable.

There are some exceptions to this "hands-off' doctrine in which the court "leaves the parties where it finds them." Where a party to the contract is a member of the class of persons for whose protection the contract was made illegal, he may enforce it or obtain restitution. Examples include the following: a. Where a person buys bonds which are illegal because they conflict with Blue Sky laws (laws to protect against tricking people into buying the "blue sky"), the one who buys them is the very one for whose benefit the laws were passed and, therefore, can elect to enforce the contract; b. An insured under a policy which is illegal because the company did not use an approved form can enforce the insurance policy; c. Where a party to an illegal contract repents and rescinds before any part of the illegal purpose is carried out, he may have restitution of the money or goods he has given in performance; d. Where one party to the contract is not *in pari delicto* with the other (i.e., is not as guilty) because he was induced to enter into the bargain by fraud, duress or strong economic pressure, he may have restitution of that which he has given in performance.

Certainty of Terms

A contract must relate to the parties their obligations and duties sufficiently enough for the parties to know what their obligations and duties are. It is essential to the enforceability of a contract that its terms are sufficiently clear to permit the courts to conclude that a contractual agreement was intended. The courts will apply well-established rules of construction to interpret the language used by the parties. Thus, to be fatally uncertain, the contract must be so indefinite as to have no exact meaning.

Form Provided by Law

In general, a contract can be made in three ways:

1. Written,
2. Oral, and
3. Implied (conduct of the parties)

Oral and Written Contracts - As a general rule, a contract need not be in writing to be enforceable. Undoubtedly the vast majority of contracts executed today are oral ones. However, there are some very important exceptions to the general rule, and for the most part, the majority of these exceptions were initiated about three hundred years ago in England. The British Statute of Frauds was enacted by Parliament in 1677. Its stated purpose was "the prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury." It contained two sections that related to the requirement of a writing in contract formation. Most states by the enactment of ,their own statutes have followed the substance of each of these sections; however, in many states variations have been deemed necessary and desirable.

Section Seventeen of the original statute related to the sale of goods having more than a specified value. Both the Uniform Sales Act and the *Uniform Commercial Code* contain sections reflecting the provisions of the original Section Seventeen. Most states will not enforce a contract for the sale of goods for more than $500 unless it is embodied in a written contract or memorandum signed by the party to be charged. There are some escape clauses in both of these uniform acts, relating primarily to receipt and retention of goods. The statute of frauds requirements do not apply to fully executed (performed) contracts.

In the vast majority of cases involving large and socially important contracts, the parties reduce their understanding to writing so as to preclude any problems concerning the statute of frauds. In very few cases does one find a statute of frauds problem in large contracts. Probably the most frequent area in which statute of fraud questions arise is where the parties to a written agreement purport to modify it orally. The oral modification is unenforceable if it is still executory. Of course, if the oral agreement is performed, then it is enforceable because the only purpose of the statute is to prevent 'the enforcement of executory oral agreements.

Classification of Contracts

While the preceding sections dealt primarily with the essential elements of a contract, whether all the necessary elements are present may depend on how the contract is "classified," in terms of the intention of the offeror at the time he extends his offer. They may be bilateral or unilateral, express or implied. The different classifications are discussed in the following paragraphs.

Bilateral and Unilateral Contracts - In a bilateral contract, the offeror is asking for a return promise. In a unilateral contract, the offeror is asking for a performance.

An offer that asks for a promise in return as the agreed exchange for a promise is an offer to enter a bilateral contract. In such a contract each party is both a promisor and a promisee. Probably the majority of contracts are of this type. On the other hand, an offer that looks forward to an act as the agreed exchange is an offer to enter a unilateral contract. Of course, in this situation only one party is a promisor, while the other is only a promisee. The promise is conditioned upon performance of the requested act and does not become fully binding until the exact act is performed. In some circumstances it is very difficult to determine just what the offeror wants in return for his promise. In these cases it is presumed that an offer invites the formation of a bilateral contract. The rationale behind this presumption is that if the consideration sought is a return promise, the offeror has somewhat greater protection than if there is no acceptance prior to actual performance. If the offer is for a unilateral contract, the offeree may begin the act but not finish it, in which case the offeror does not receive what he wanted but is bound to keep his offer open for a reasonable time once performance is undertaken.

Express and Implied Contracts - Express contracts are contracts that are in writing or are oral. Implied contracts are formed through the conduct of the parties. There are express contracts and two kinds of implied contracts: "implied in fact" contracts and "implied in law" contracts. The latter are sometimes called *quasi-contracts.* Express and implied in fact contracts are both based on actual agreement between the parties. In express contracts, the parties manifest their intention to be bound by the use of oral or written words or by other signs or symbols that have specified meanings. In the implied in fact contract; the parties manifest their assent by conduct rather than by such words or other symbols.

In contrast, implied in law contracts *(quasi-contracts)* are not based upon any actual agreement or promises, and they do not involve any intention to enter a contract; they are not actual contracts at all. In very general terms, an implied in law contract exists where one person has received or used something for which it is Just that he should compensate the other. More specifically, if one person confers a benefit on another, he may recover in quasi-contract the reasonable value if it would otherwise be unjust for the recipient to retain or enjoy the benefit. Historically, the amount of recovery has been the worth of this benefit to the person who received it; it is not necessarily the market value for like things or services (although this may be the price arrived at by the courts in some cases), and the modern trend is to consider the cost incurred by the one who confers the benefit. However, if Able expends costly time and money on doing something for Baker under circumstances where the doctrine of quasi-contract is brought into effect, Able may not be able to recover any monetary return if the service performed for Baker was not of any monetary value to Baker. In addition, not all benefits are compensable. One cannot-force benefits on another. So, where one person refuses the service and the other performs the service anyway, there will not be any recovery in quasi-contract. The reason for this is that quasi contract is utilized only where it would be unjust not to compensate the person who performs the service or who transferred title or use of goods.

Generally speaking, there are two important areas in which quasi-contract cases arise. The first involves emergency situations. Where one performs services for another in an emergency, there is a presumption that the services are performed gratuitously. An exception is made when the performer of the services goes to great trouble or expense in performing the service, and this is allowed to override the presumption of gratuity. Another exception is made where the one performing the service is a professional in that particular line of work. In that instance, a presumption arises that the professional is not performing gratuitously, but rather is pursuing his profession. The second area in which quasi-contract cases arise is where one has a duty to do something and someone else voluntarily acts for him so that the duty is discharged or satisfied. The one who had the duty is unjustly enriched and can be required to compensate the acting party in quasi-contract. However, in general the courts lack jurisdiction to hear a claim against the Government under the quasi-contract doctrine.

Question: Where the Government's course of dealing with a contractor has been to accept the goods now and place a formal order later, does the contractor's reliance on that practice create an implied contract? See the case of O'NEILL OIL SERVICES, INC. at Vol. 2.

Discharge of Contracts

A discharge of a contract releases both parties from their obligations and duties. The "discharge of a contract" means that obligations incurred by the parties when they entered into the agreement are excused; no longer are they bound to perform as they had promised. Contracts may be discharged in a number of ways:

1. Performance by both parties. Note Very few contracts are ever performed to the letter of the contract, yet the contract is still deemed fulfilled. (See discussion on "Substantial Performance" below).
2. An agreement to rescind the contract is binding on both parties and discharges all obligations.
3. A new contract may, by agreement of all parties to the original contract, expressly or implicitly discharge the original contract. An express substitution of the new contract for the original one would be given that effect by the courts. Additionally, a new contract between the same parties relating to the same subject matter, but which is wholly or substantially inconsistent with the first contract, may discharge the duties arising under that first contract. The courts under such circumstances could infer a substitution.
4. Frequently the original parties to a contract agree to substitute a new party. Assuming that consent of the new party is obtained, the new party assumes the obligations of the original party he replaces. An agreement called a *novation* acts to discharge the obligations of the party who has been replaced by the substitution.
5. An accord and satisfaction operates to discharge a contract. On occasion at least one of the parties to a contract may become dissatisfied with his promise and wish to substitute a new promise. There are even instances where the parties are not certain

just what they did promise. In both of these cases the parties might agree to a new contract that has the effect of discharging the old one. An example would be where Able contracted to provide a service for Baker, with the price term left open (which is not unusual for service contractors, who frequently only quote cost estimates). After the work is completed, Able sends Baker a bill for $500, and Baker, believing the bill to be unreasonable, refuses to pay it. After several discussions, the parties are unable to reach an agreement on the price. Finally, Baker sends Able a check for $400 and states "Final payment of amount due from Baker to Able on Service Contract No. 1234" on the reverse side of the check. The courts would interpret cashing of the check by Able as final agreement on the price. Such an agreement is called an *accord.* When the bank honors the check by making payment, the agreement has been performed, and performance of the new agreement in lieu of the old obligation is called a *satisfaction.* Thus, by accord and satisfaction, Baker's obligations under the original contract have been discharged. It should be noted, however, that an accord and satisfaction would operate only where it resolves a genuine dispute over a contract term.

When a contract provides for the payment of a stated sum, payment of that amount discharges the paying party of any further obligations. But actual payment is not essential. Tender of the contract amount is sufficient to act as a discharge. (If tender of payment did not have such effect, the party to be paid could withhold performance by merely refusing to accept payment.) Finally, contract duties may be discharged by operation of law, such as through an adjudication of bankruptcy or the execution of a judgment previously obtained.

Substantial Performance - The word *performance* is deserving of some comment since it has been used often in this discussion. Where a party to a contract promises a certain performance, there is no doubt that the other party (the promisee) expects full performance, even if performing is extremely difficult. The parties can require exact, perfect, full performance if they so desire.

However, where the promisor has performed substantially but not completely, he has satisfied the condition precedent to the extent that he can recover the full contract price, less the damages suffered by the other party because the performance was incomplete. This is known as the doctrine of *substantial performance* but does not apply where the party who only partly performed is guilty of bad faith, or willfully breached, in only partially performing his promise.

The doctrine of substantial performance requires that the performance actually tendered by the promisor be substantial in an objective sense. It is said that performance is substantial where there has not been a "material" breach of a duty to perform; if a breach is "material" (Le., important), the performance has not been substantial. In determining the materiality of a failure to fully perform a promise, the courts use a variety of considerations. Typical considerations include the degree of completion of performance in a physical sense, the hardship on each party, the determination of the type of behavior of the one failing to fully perform, and the adequacy of compensation to the injured party.

Similarities and Differences between Government Authority in Government and Commercial Contracts.

Similarities - There are many similarities between commercial and Government contracts with respect to the concept of authority. In the context of Government procurement, the principal is the United States Government. All those who act for or in the name of the Government are its agents. The Government is bound by the acts of its agents committed within the scope of their authority. Usually the authority of Government agents is express such as the authority set forth in a Contracting Officer's warrant, to be exercised in accordance with applicable statutes and regulations. Where the actions or statements of a Government agent are not in conformity with an applicable statute or regulation, it is generally outside the agent's actual authority and is not binding on the Government. This may appear to have harsh consequences where a private contractor has relied on an official's unauthorized actions and suffers a resulting injury; however, private contractors and other parties are presumed to know the law. All statutes and regulations are required by law to be published, and publication gives the public "constructive notice" of their contents. Even though a party dealing with the Government does not, in fact, know of the appropriate law, he is deemed to know it under the doctrine of constructive notice.

Question: If the supervisor has only "constructive" knowledge of the Government agent's unauthorized act, and does not follow established ratification procedures, can the Government be bound by an "implicit ratification?" See the case of RELIABLE DISPOSAL COMPANY, INC. at Vol. 2, p. 2-24.

Differences - One of the major differences between Government contract law and commercial contract law is in the application of the doctrine of apparent authority, sometimes called *agency by estoppel.* Generally speaking, there are three areas in which Government contracts may differ from commercial contracts: required clauses, the firm bid rule, and implied contracts.

Estoppel - Government contract law differs from commercial contract law in the application of estoppel. *Estoppel* means that a party who makes a representation on which another party justifiably relies, resulting in some injury, is barred from later denying the accuracy of the representation and must repair the resulting injury. For example, in one well known case Drennan obtained a subcontract price quote from Star Paving for use in developing Drennan's own bid on the fixed price prime contract. Drennan was awarded the prime contract but Star Paving refused to perform, citing an error in its quote. Since Drennan had reasonably relied on the quote as Star Paving had intended, Star Paving was held liable on the basis of "promissory" estoppel: it was not permitted to withdraw or deny the price quote. *Drennan v. Star Paving* Co., 333 P.2d. 757 (1958); *Hoel-Steffen Construction* Co. *v. US.*, 1981 WL 30819 (Ct.CI.). The Government is generally not bound by estoppel. As in the case of quasi-contracts, the courts and boards generally do not have jurisdiction to consider a claim against the Government on the basis of estoppel. See *LaMirage, Inc. v. US.,* 44 Fed.CI. 192 (1999). Since the Government is not bound by the acts of its agents who lack actual authority (or whose actions exceed their authority), the Government is generally not bound by estoppel. There is an exception ("equitable estoppel"), however, which is discussed below.

Apparent Authority It is well-settled in Government contracting that apparent authority will never bind the Government. Apparent authority is, in effect, an application of the doctrine of estoppel in which a "representation" is made by creating the appearance that a person has certain authority that he or she does not actually have. Although a firm in the commercial marketplace may be bound when other parties reasonably rely on the appearance that its agent has authority to take certain action, the Government will not be bound unless its agent has *actual* (not merely apparent) authority to take the action. "[A]nyone entering into an arrangement with the Government takes the risk... that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or through [regulations]. And this is so even though... the agent himself may have been unaware of the limitations on his authority. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. at 384." *City* of *EI Centro v. US,* 922 F.2d 816 (CAFC 1990). If the agent does not have actual authority to act, the Government will not be bound to the contract. Thus the doctrine of apparent authority or estoppel will not apply to bind the Government where the act by the agent is not authorized (e.g., where it violates a statute or the Constitution). This is frequently said to be a departure from private contract law principles. As has been described, apparent authority is applied to bind the principal only where the third party relied on the principal's representation that the agent has authority, and not the agent's own representation. When the principal is the Government, its delegations of authority to agents in the area of Government contracting is public information, and it is generally difficult to argue that the third party was misled as to the actual authority of the agent.

Question: If a Government office exists to distribute certain information concerning legal benefits, but inadvertently gives out misinformation, is the Government obligated to compensate the recipient who relied on it in good faith and suffered financial injury as a result? See OPM v. RICHMOND at Vol. 2, (Chapter 3 case)

Required Clauses - Most of the differences between Government contracts and private contracts arise because of clauses included in Government contracts. The Federal Acquisition Regulation requires that certain clauses be inserted in contracts to which the Government is a party. Many of these mandatory clauses would not be found in contracts between private parties. An example is the Changes clause. Under this clause, a Contracting Officer may make changes within the general scope of the contract, and where a change in the work to be performed by the contractor causes a change in the cost of the work, the clause provides for an equitable adjustment of the contract price. The unique feature of this clause is that the contractor is required to proceed with the work as changed *before* negotiating the price of the change. The Disputes clause, which implements the statutory dispute resolution mechanism created by the Contract Disputes Act of 1978, also sets apart Government contracts from those involving strictly private parties. Under this clause, any dispute between the contractor and the Contracting Officer which relates to the contract must first be given to the Contracting Officer. The contractor may appeal the Contracting Officer's final decision to the agency Board of Contract Appeals, and the decision of that Board is final unless certain criteria are met. In the field of private contracts there is no such provision; perhaps the most similar provision would be in contracts involving mandatory arbitration. When awarding contracts for commercial items, the Contracting Officer has authority under FAR 12.302 to tailor specific clauses without further approval when the changes are consistent with customary commercial practices for a particular marketplace.

Firm Bid Rule - Under ordinary contract law, an offeror generally may withdraw his offer (bid) at any time before it is accepted, even though the offeror has expressly promised to keep the offer open, unless consideration has been received by the offeror for agreeing to keep the offer open for a stipulated time. In Government contracting, however, the general rule in a sealed bid procurement is that after disclosure of the offer is made at bid opening, an offeror (bidder) *cannot* either withdraw or modify the bid or recover a deposit made. The rationale behind the rule is that the Government is at a disadvantage in comparison with private offers, in that the Government must either accept the lowest (or lowest as the case may be) responsive bid or reject all of the bids and re advertise. On occasion this doctrine has been relaxed by the courts where there are special circumstances, such as an obvious honest mistake on the bidder's part or a misleading action on the part of the Government. Therefore, the Government should be allowed a reasonable time after the opening of bids to ascertain whether collusion or fraud has been perpetrated.

Implied In Law (Quasi) Contracts - A final difference between private and Government contracts can be found in the area of implied contracts. Earlier reference was made to the distinction between an implied in fact contract and an implied in law contract. Generally, the Government is subject to the same rules concerning implied in fact contracts as a private party would be in the same circumstances. Implied in law contracts (quasi-contracts) present a different situation, because they do not require that the parties assent to them. The courts have consistently declined to recognize a contract as binding upon the United States where the element of consent was wholly lacking and could not be reasonably implied from the facts and circumstances or from the acts of the Government representatives. Even in those instances where the Government has actually derived a benefit from the services of a private individual, the courts have refused to recognize an obligation on the part of the United States to pay if there is no evidence of consent on the part of the Government. In many similar situations involving private contracts, the law would find that the private party had implicitly consented, on the theory that such a finding was necessary in order to avoid unjust enrichment.

Where the Government's authorized agents have taken property or services by fraud, relief has been given on the basis of quasi-contract. Also, where the Government uses property with the express consent of the owner, but where the owner expects compensation, an implied contract to pay a reasonable compensation for such usage may arise. Sometimes the relationship might be characterized more accurately as involving an implied in fact contract, and other times quasi-contract may be one of several alternative theories on which the Government is held liable. Notwithstanding these exceptions, it is unusual for the Government to be held liable under a theory of implied in law contract.

Sovereignty of the Government - *Sovereignty* means autonomy, or existence without external control. Although the Government is sovereign, it permits itself to appear nonsovereign as situations require. The Supreme Court of the United States has said that when the Government descends from its position of sovereignty and enters the arena of commerce, it submits itself to the same laws that govern individuals. This statement fairly describes the position that our Government and its myriad agencies occupy in the field s>f commercial contracts. The Government is on an equal footing with the contractor as a party to the contract. However, the Government never fully "steps down" from its position as the sovereign, and the Constitution itself prevents a complete stepping down. Actually, the Government never gives up its role as the sovereign unless it does so voluntarily, and this can be done only to the extent that the Constitution either expressly or implicitly authorizes.

Earlier, reference was made to certain provisions of the Constitution delegating power to the executive and legislative branches to carry on certain specified activities. In addition, the so-called "necessary and proper clause" vests discretionary power in the Congress to delegate to agencies authority to carry these activities into effect, with whatever reasonable means are deemed necessary. The absolute extension of this "necessary and proper clause" involves the concept of "eminent domain." Under this theory the Government can seize whatever is needed to accomplish its legitimate ends, as long as the government pays fair compensation.

In this context it can be understood that the Government never really steps down into the commercial world, but merely allows itself to become involved to the extent needed to accomplish its objectives. It is easier to encourage cooperation than to demand compliance. The Government encourages private action in order to accomplish the ends delegated to the Government by the people themselves. The primary method used to maintain tight control of its contractual relationships is to require those dealing with the Government to do so on an all-or-nothing basis. Through the use of a standard form contract designed to afford maximum protection to the Government under all anticipated circumstances, the Government is able to dictate the terms of contracting to such an extent that the other party to the contract actually has little effect on the terms in any given contract. The courts frequently grant relief to parties contracting with the Government on the grounds that, in case of ambiguity, a contract is construed against the one who dictates the terms. In summary, it is fair to state that the Federal Government maintains its sovereignty at all times, but it can and does permit itself to play the role, at least in part, of a nonsovereign. It could be said that the Government is still the prince even when clothed in commercial rags.

Government Privileges - With a few notable exceptions, the differences between Government contracts and those contracts involving strictly private parties are attributable to the nature of contract negotiations rather than to a theory of Government privilege. However, there are some fundamental rules by which the Government receives preferential treatment.

Immunity From Suit - One aspect of this preferential treatment is that the sovereign is immune from suit. Historically this doctrine of *sovereign immunity* derived from the concept that the King, who ruled by "divine right," could do no wrong. A practical reason for the doctrine is that a sovereign acting in accordance with its delegated responsibilities must not be harassed by . private suits to such an extent that its function is impaired. The Supreme Court has said that a sovereign is immune from suit "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank,* 205 U.S. 349, 353 (1907). Actually, the Government puts aside its sovereign immunity and allows itself to be sued under certain circumstances. Under the Tucker Act, the Government permits suits against it that arise out of express or implied in fact contracts. These actions may be brought in federal courts and are subject to review by higher courts in the federal system.

Sovereign Acts - Another aspect of the concept of sovereignty is the immunity that the Government enjoys when its actions obstruct the contractor's performance of a contract. Although it is a general rule that each party to a contract has an implied duty not to interfere with the other party's performance, where the Government is a party to a contract, Government action that interferes with the other party's performance will generally not be treated as a breach of the contract. However, a distinction is made between Government action taken for the general public good and action taken solely for the purpose of interfering with a particular contract or contractor. If the Government's action targets a particular contract or contractor, obstruction caused by the act would be compensable or remediable in favor of the private contractor. A sovereign act could be where the federal government needs to use a portion of a contractor's land in order the complete a federal highway.

Federal Law Governs - Another aspect of sovereignty is the question of which law is to be applied to a contract involving the Government. The famous case of *Erie Railroad Company* V. *Tompkins,* 304 U.S. 64 (1.938), held that in cases in federal courts between private parties, state law rather than federal law will be applicable to the controversy. If the *Erie* doctrine were applied to it, the Government's rights under a contract could vary from state to state. It is highly desirable that the Government's affairs be administered on a uniform basis, and the Erie doctrine would not be productive toward this end. However, the case of *Clearfield Trust Company v. United States,* 318 U.S. 363 (1943), held that the *Erie* doctrine does not apply to cases in which the Government is a party; accordingly, Government contracts are subject to federal law, not state law. The rule of law that governs litigation between private parties and the Government is formulated either by the Congress through appropriate ads or by the federal judiciary through case decisions.

Immunity From Taxation - Finally, the Federal Government and its agencies and property are immune from state and local taxation, under the supremacy clause of the Federal Constitution. This tax immunity was established in the famous case of

McCulloch v. Maryland, 4 Wheaton 316 (1819), where John Marshall stated "the power to tax involves the power to destroy." The modern tendency is to retreat from a strict interpretation of this principle. In many situations a tax either on a party dealing with the Government or upon property owned by the Government will be upheld unless the tax discriminates against the Government or its business associates.

Procurement Legislation

Federal Acquisition Regulation - The Armed Services Procurement Regulation, later called the Defense Acquisition Regulation OAR, was superseded on April 1, 1984 by the Federal Acquisition Regulation FAR. The Department of Defense and General Services Administration under direction of the Office of Federal Procurement Policy, originally drafted the FAR to provide uniform policies and procedures for acquisition of all executives' agencies and not just for the military. It is located under chapter 1 of title 48 of the Code of Federal Regulations. The FAR's vision is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives. Under these "guiding principles: "each member of the acquisition team may exercise his or her initiative in achieving this vision through specific strategies, practice, policy or procedure if it is in the best interest of the Government and is not addressed in the FAR, or prohibited by law (statue or case law), executive order or other regulation.